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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID WAYNE SCONCE,

Defendant and Appellant.

B299924, B300788

(Los Angeles County
Super. Ct. No. A578478)

APPEAL from an order of the Superior Court of Los Angeles County, Dorothy L. Shubin, Judge. Appeal in case No. B300788 affirmed. Appeal in case No. B299924 dismissed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In 1997, defendant and appellant David Wayne Sconce pled guilty to conspiracy to commit murder. After he violated probation, he was sentenced to a prison term of 25 years to life. After passage of Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill 1437), Sconce petitioned for resentencing pursuant to Penal Code section 1170.95.¹ The trial court denied the petition, finding Sconce was ineligible for relief. We affirm the trial court's order in case No. B300788 and dismiss the appeal in case No. B299924.

FACTUAL AND PROCEDURAL BACKGROUND²

1. *Sconce's offenses*

In 1988, appellant was charged in the Lamb Funeral Home case, Los Angeles County Superior Court case No. A573819, with multiple counts of mishandling and unlawful disposition of human remains, assault by means likely to produce great bodily injury, robbery, conspiracy related to various of the foregoing charges, theft, bribery of witnesses, solicitation of perjury, and solicitation of three murders.³

¹ All further undesignated statutory references are to the Penal Code.

² We derive the factual and procedural background in part from prior opinions related to this matter, of which we take judicial notice, including *People v. Sconce* (1991) 228 Cal.App.3d 693; *People v. Sconce* (Dec. 1, 2014, B249136) (unpublished); and *Sconce v. Garcetti* (9th Cir. Aug. 29, 1996, No. 96-55209) 1996 U.S. App. Lexis 22665.) (See Evid. Code, §§ 452, subd. (d), 459.)

³ Specifically, Sconce was charged with 28 counts of unlawful removal of body parts from human remains (former Health & Saf. Code, § 7051); three counts of mutilation of human remains

In 1989, Sconce was charged in Los Angeles Superior Court case No. A578478, with conspiracy to murder Elie Estephan (§ 182, 187, subd. (a)). Sconce allegedly asked a crematorium employee to murder Estephan—the estranged husband of Sconce’s brother-in-law’s girlfriend—in order to obtain life insurance proceeds. (*People v. Sconce, supra*, 228 Cal.App.3d at pp. 696–699.) Thereafter, the trial court (Judge Terry Lee Smerling) set aside the information on the theory Sconce had withdrawn from the conspiracy. In 1991, this court reversed Judge Smerling’s order and the information was reinstated. (*Id.* at pp. 696, 704.)

While the People’s appeal in the murder conspiracy case was pending, on August 30, 1989 Judge Smerling negotiated a plea agreement—without the prosecutor’s agreement—in which Sconce would plead guilty to 21 of the charges in the funeral home case, in exchange for a five-year term. At the time, other counts in the funeral home case were also being reviewed in a

(former Health & Saf. Code, § 7052); two counts of multiple cremation of human remains (Health & Saf. Code, § 7054.7, subd. (a)(1)); two counts of commingling human remains (Health & Saf. Code, § 7054.7), subd. (a)(2)); one count of failure to inter human remains within a reasonable time (Health & Saf. Code, § 7103); two counts of conspiracy to mishandle human remains (§ 182); assault by means likely to produce great bodily injury on three different victims, and conspiracy to commit such assaults (§ 182, former § 245, subd. (a)(1)); robbery and conspiracy to rob one of those victims (§§ 182, 211)); grand theft auto (§ 487); receiving stolen property (§ 496); solicitation of the murder of his grandparents and a deputy district attorney (§ 653f, subd. (b)); bribery and offers to bribe witnesses (§§ 137, subd. (a), 138, subd. (a); solicitation of perjury (§ 653f, subd. (a)); and conspiracy to obstruct justice (§ 182, subd. (a)(5)).

separate appeal. Judge Smerling stated that if those counts, or the murder conspiracy count, were ultimately returned to the trial court and Sconce pled guilty to them, the court would impose no additional prison or jail time, but would impose probation. Accordingly, Sconce pled guilty to 21 charges in the funeral home case.

After this court reversed the order setting aside the information in the murder conspiracy case, the People obtained an order disqualifying Judge Smerling. The 1989 plea bargain was set aside on the ground it was unauthorized, in that Judge Smerling had lacked jurisdiction to make the bargain because the murder conspiracy charge was on appeal at the time, and it was not a proper subject for plea bargaining pursuant to section 1192.7.

Sconce sought review of the order setting aside the plea bargain in federal court. In August 1996, in *Sconce v. Garcetti*, *supra*, 1996 U.S. App. Lexis 22665, the Ninth Circuit ordered specific performance of the plea bargain, reasoning that although Judge Smerling had lacked authority to make the bargain, the District Attorney delayed until Sconce completed, or substantially completed, his five-year prison term before moving to set it aside. (*Sconce v. Garcetti*, at pp. *2–3, *12–17)

2. *Sconce's plea to the murder conspiracy, revocation of probation, and imposition of sentence*

On April 29, 1997, after the Ninth Circuit's ruling, Sconce appeared in Los Angeles County Superior Court before Judge Thomas W. Stoeber. Sconce pled guilty to conspiracy to commit

murder in case No. A578478 and admitted one overt act, and was placed on lifetime probation.⁴

In approximately 2011, Sconce pled guilty to a federal firearms offense in Montana. As a result, he was returned to California and his probation was revoked. On May 6, 2013, Judge Dorothy L. Shubin imposed the mandatory term of 25 years to life in prison on the murder conspiracy charge.

3. Sconce's section 1170.95 petition

In late 2018, apparently anticipating the implementation of Senate Bill 1437, Sconce requested that the superior court clarify in which court his section 1170.95 petition should be filed. On December 5, 2018, Judge Darrell Mavis filed an order informing Sconce that Judge Stoeber, who had sentenced him, was not available; therefore, since Judge Shubin had presided over the probation revocation proceeding and imposed Sconce's prison term, any section 1170.95 petition should be heard by her.

Sconce thereafter filed a petition for resentencing pursuant to section 1170.95. Using a preprinted form, he checked boxes stating that a charging document had been filed against him allowing the prosecution to proceed under a felony murder theory or the natural and probable consequences doctrine; he pled guilty to first or second degree murder in lieu of trial because he believed he could have been convicted of those crimes pursuant to one or both of those theories; he was not the actual killer, did not act with intent to kill, was not a major participant in the crime, and did not act with reckless indifference to human life; and he

⁴ On the same date, Sconce pled guilty in the funeral home case to soliciting the murder of his grandparents and of a deputy district attorney (§ 653f, subd. (b)), and bribing or offering to bribe witnesses. (§§ 137, subd. (a), 138, subd. (a).)

could not now be convicted of murder in light of changes to the law wrought by Senate Bill 1437. He handwrote in the margin, “No murder occurred.” He also checked a box stating, “I request that this court appoint counsel for me during this re-sentencing process.”

The court appointed counsel for Sconce.

4. *Sconce’s motion to have his section 1170.95 petition heard by Judge Smerling*

On June 21, 2019, Sconce filed a document entitled “motion to transfer resentencing application to the original sentencing judge, pursuant to Penal Code sects. 1170.95(a)(1, 2) and 1170.95 (b)(1).” Therein, Sconce argued that because Judge Smerling originally sentenced him, section 1170.95 required that Judge Smerling rule on his petition. According to Sconce, the fact Judge Smerling had been disqualified from his case years before was irrelevant. On July 15, 2019, Judge Mavis denied the motion, stating that “the petition is before the correct court pursuant to Penal Code section 1170.95.”

5. *Ruling on the section 1170.95 petition*

After considering briefing from the parties, Judge Shubin denied the section 1170.95 petition on August 14, 2019. The court reasoned that section 1170.95 provides relief only to persons convicted of murder, not conspiracy to murder. Moreover, conspiracy to commit murder specifically requires the intent to kill, and cannot be based on an implied malice theory. Therefore, Sconce necessarily acted with an intent to kill, “specifically taking him out of the provisions of . . . section 1170.95.”

6. *Sconce's appeals*

Sconce filed two notices of appeal. The first, in case No. B299924, was filed on July 31, 2019, and purported to appeal the “7-15-19 minute order” issued by Judge Mavis, denying Sconce’s request to transfer the section 1170.95 petition to Judge Smerling. The second, in case No. B300788, was filed on August 14, 2019, and appealed Judge Shubin’s denial of the “SB 1437 petition.”

Because Sconce’s appeals pertain to the same subject matter—resolution of his section 1170.95 petition—we ordered the two appeals consolidated.

DISCUSSION

After review of the record, Sconce’s court-appointed counsel filed opening briefs in both appeals that raised no issues, and requested that this court conduct an independent review of the record in each case pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Appellant was advised that he had 30 days to submit by brief or letter any contentions or argument he wished this court to consider, and he has filed identical supplemental briefs in each case.

Judge Mavis’s denial of Sconce’s request to transfer the petition to Judge Smerling was not an independently appealable order. (See *People v. Mazurette* (2001) 24 Cal.4th 789, 792 [section 1237 “establishes the general rule that a criminal defendant can appeal only from final judgments and those orders deemed by statute to be final judgments”]; *People v. Moore* (2003) 105 Cal.App.4th 94, 98.) Accordingly, we order the appeal in case No. B299924 dismissed, and consider the propriety of Judge Mavis’s ruling in conjunction with our review of the denial of the section 1170.95 petition in case No. B300788.

1. *The trial court properly denied the section 1170.95 petition*

The trial court properly denied Sconce's section 1170.95 petition. By its plain terms, Senate Bill 1437 and section 1170.95 do not encompass crimes other than murder. (See, e.g., *People v. Dennis* (2020) 47 Cal.App.5th 838, 844; *People v. Flores* (2020) 44 Cal.App.5th 985, 993; *People v. Cervantes* (2020) 44 Cal.App.5th 884, 887; *People v. Larios* (2019) 42 Cal.App.5th 956, 961, review granted February 26, 2020, S259983; *People v. Munoz* (2019) 39 Cal.App.5th 738, 753, review granted November 26, 2019, S258234.) Sconce was not convicted of murder; he was convicted of conspiracy to commit murder, a non-eligible offense.

Moreover, after passage of Senate Bill 1437, an accomplice is still liable for murder if he or she acted with express or implied malice. (See §§ 188, subd. (a); 189, subd. (e)(2); *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1135, review granted March 18, 2020, S260598; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 57, review granted March 18, 2020, S260410.) Conspiracy to commit murder requires that a conspirator personally have the specific intent to kill. (See, e.g., *People v. Garton* (2018) 4 Cal.5th 485, 516; *People v. Juarez* (2016) 62 Cal.4th 1164, 1169–1170.) Conspiracy to murder cannot be based on an implied malice theory. (*People v. Swain* (1996) 12 Cal.4th 593, 607.) Therefore, Senate Bill 1437—which amended the law only to restrict the imputation of malice—has no application to the offense of conspiracy to murder. Because Sconce is ineligible for section 1170.95 relief as a matter of law, the trial court properly denied his petition.

In supplemental briefing, Sconce presents several arguments in support of his contention that he is entitled to

relief. None has merit. As far as we understand them, his arguments are as follows.⁵

Sconce references the legislative intent underlying Senate Bill 1437. He complains that his sentence is no different than that imposed on a person convicted of murder under the felony murder rule, yet he is less culpable than such a killer. He insists that the Legislature intended, in enacting Senate Bill 1437, that only persons meeting the requisites of amended section 189, subdivision (e), would be required to serve sentences equivalent to those imposed for murder. To the contrary, the Legislature expressly stated its goal was to ensure that murder liability is not imposed on a person who did not act with the intent to kill. (See Stats. 2018, ch. 1015, § 1, subd. (f).) Since conspiracy to murder requires that each participant have the specific intent to kill, the Legislature did not intend Senate Bill 1437 to encompass that offense.

Sconce further asserts that the information allowed the People to proceed against him under a theory of first degree felony murder because, had a murder occurred, it would necessarily have been charged as a felony murder. But precisely because no murder occurred, the People could not have proceeded on a felony murder theory.

Sconce asserts that “[t]hrough application of Penal Code section 182.1 and without any murder occurring,” any sentence for conspiracy to murder must “first be dependent upon whether

⁵ Sconce has attached to his supplemental brief a handwritten petition for writ of habeas corpus that he filed in the superior court and then withdrew. We understand Sconce to offer this document in order to reference the arguments made therein, not as an attempt to appeal any habeas petition.

or not the individual meets the requirements of” section 189, subdivision (e). We do not follow this logic. Subdivision (e) of section 189 pertains to convictions for murder based on a felony murder theory. Nothing in Senate Bill 1437 or section 1170.95 suggests that a person cannot be guilty of conspiracy to murder unless he or she was an actual killer, a direct aider and abettor, or a major participant in a crime acting with reckless indifference to human life. Moreover, the California Penal Code does not contain a section 182.1.

Sconce points out that because he pled guilty to the murder conspiracy charge pursuant to *People v. West* (1970) 3 Cal.3d 595, and *North Carolina v. Alford* (1970) 400 U.S. 25, his plea did not admit his guilt. But section 1170.95 excludes conspiracy to commit murder from its reach because that offense, in the abstract, requires a specific intent to kill. The fact Sconce may have pled pursuant to *West* and *Alford* does not mean section 1170.95 encompasses the offense of conspiracy to murder.⁶

Sconce briefly asserts that the original conspiracy charge was “defective” because no other person was named or charged as a coconspirator; he committed no overt act in furtherance of the conspiracy; and, based on the evidence in the preliminary hearing transcript, he should only have been charged with solicitation of murder. These contentions go to the validity of his plea and conviction, and are not cognizable at this juncture. Any such challenges should have been raised in a direct appeal years ago, with a certificate of probable cause, before the time for such an

⁶ The record before us does not appear to contain a transcript of the plea hearing or the plea forms, and we are unable to ascertain the particular terms of Sconce’s plea.

appeal expired. (See Cal. Rules of Court, rules 8.308, 8.304(b); § 1237.5.) Because Sconce's judgment of conviction is final, these claims are not properly before us.

2. Denial of motion to transfer the petition to Judge Smerling

The denial of Sconce's motion to transfer the resentencing petition to Judge Smerling comported with the requirements of section 1170.95. Under section 1170.95, a resentencing petition must be filed "with the court that sentenced the petitioner," and "[i]f the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition." (§ 1170.95, subd. (b)(1).) Here, the late Judge Stoever took Sconce's plea and imposed probation on April 29, 1997. Because Judge Stoever was no longer available to adjudicate the section 1170.95 petition, the matter was appropriately heard by Judge Shubin, who had imposed Sconce's sentence after finding him in violation of probation.

Sconce argued below that the murder conspiracy charge, while originally filed in case No. A578478, should nonetheless be considered a component of case No. A573819, in light of the negotiated plea entered in Judge Smerling's court on August 30, 1989 in the latter case. But Judge Smerling did not take Sconce's plea to the murder conspiracy charge, nor did he sentence him on that charge. On August 30, 1989, when Judge Smerling made the plea agreement, Sconce pled guilty to various charges in the funeral home case, No. A573819. As of August 30, 1989, Sconce had neither pled to nor been sentenced on the murder conspiracy charge. Accordingly, Judge Mavis correctly concluded the section

1170.95 petition should be adjudicated by Judge Shubin, not Judge Smerling.

We have examined the record, and are satisfied no arguable issues exist and Sconce's attorney has complied with the responsibilities of counsel. (*People v. Kelly* (2006) 40 Cal.4th 106, 126; *People v. Wende, supra*, 25 Cal.3d at pp. 441–442.)

DISPOSITION

The appeal in case No. B299924, filed July 31, 2019, is dismissed. The trial court's order denying the section 1170.95 petition in case No. B300788 is affirmed.

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EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.